NCL4CARC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

KALOMA CARDWELL,

Plaintiff,

v. 19 Civ. 10256 (GHW)

DAVIS POLK AND WARDWELL LLP, *et al*,

Telephone Conference

Defendant.

----------x

New York, N.Y.
December 21, 2023
3:30 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

DAVID JEFFRIES
Attorney for Plaintiff

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorneys for Defendants
BY: BRUCE BIRENBOIM
JEH JOHNSON
MARTHA GOODMAN
SUSANNA BUERGEL

ALSO PRESENT: INTERPRETER/MISC.
EXTRA PEOPLE

(Case called)

THE COURT: Who is on the line for plaintiff?

MR. JEFFRIES: Good afternoon, your Honor. David Jeffries for Mr. Kaloma Cardwell, present with Mr. Cardwell.

THE COURT: Thank you.

And who is on the line for defendant?

MR. BIRENBOIM: Good afternoon Bruce Birenboim from Paul Weiss, and I'm here representing defendants with my parters Jeh Johnson, Susanna Buergel, and Martha Goodman.

THE COURT: First off, let me begin with a few brief remarks about the rules I would like the parties to follow during this conference. At the outset, please remember this is a public proceeding. Any member of the public or press is welcome to dial into this conference. I'm not presently monitoring whether third parties are auditing the conference, but they are welcome to do so. The parties should keep that possibility in mind.

Second, please state your name each time that you speak. Please do that regardless of whether or not you've spoken previously.

Third, please keep your lines on mute at all times except when you are speaking.

Fourth, please abide by instructions by our court reporter that are designed to help the court reporter do his job.

Finally, I'm ordering that there be no recording or rebroadcast of all or any portion of today's conference, there will be a transcript.

Counsel, I scheduled this as an opportunity to take further action on the parties' motions *in limine*, really the defendants' motion *in limine*. We had an extended argument regarding the motions at our last pretrial conference, but pressing time left me unable to do more than provide a brief summary of my expected rulings with respect to the motion *in limine*. My hope for this conference is to provide a more feedback regarding the motions *in limine* to explain my views based on the parties' arguments, both orally at our conference, and in your written submissions.

So let me just start by confirming that neither side has anything additional that you would like to add to the written submissions or the oral arguments that was presented at our conference on the 10th or 11th.

In any event, counsel for defendant, let me start with you. Did you have anything else that you would like to add?

MR. BIRENBOIM: No, your Honor. We are fine where we are. Thank you.

THE COURT: Thank you.

Counsel for plaintiff, let me hear from you.

MR. JEFFRIES: Your Honor, just for a point of clarification, is this with respect to all of the motions *in*

limine, or is this oriented to any one in particular?

THE COURT: This is all of them.

MR. JEFFRIES: No, your Honor.

THE COURT: Thank you. Good.

So I expect to now deliver some decisions on the motions *in limine*. Let me first say that my general rule is that I require that the trial lawyers for each side participate in each conference. Because I expect to only engage the parties in a very limited way, if at all, as I get through my analysis of the remaining motions *in limine* and business records issue, I'm happy to excuse anybody from the call that does not want to be on the call. I don't member think all members of each team need to be on the line. A single lawyer can potentially respond to questions on either side I'm sure will suffice. So I'm about to begin a rather lengthy discussion of my analysis of the motions *in limine*. So I'm happy, for the sake of efficiency, to excuse anyone who either side thinks is surplusage. Please feel free to disconnect. You need not let me know that you are disconnecting. I just wanted to make sure that each side has at least one lawyer representing it on the call as we go through the remainder of today's conference.

With that, I'm going to begin with an introduction.

One, introduction. I will now deliver my decisions on defendants' motion *in limine*. I will do so orally. Defendants

filed an omnibus motion on September 15, 2023, where Defendants raised nine motions in limine. Dkt. No. 325 ("Motion"); see also Dkt. No. 324 (notice of motion). Plaintiff filed his opposition to those motions on September 28, 2023. Dkt. No. 343 ("Opposition"). Defendants filed their reply on October 3, 2023. Dkt. No. 344 ("Reply"). Defendants also filed a letter on October 9, 2023 asking for the Court's ruling on the admissibility of Plaintiff's performance reviews as business records. Dkt. No. 345. Plaintiff objected in his October 11, 2023 letter. Dkt. No. 346. We briefly discussed this issue at the November 27, 2023 conference, at which Defendants stated they would submit their certification for the performance reviews that week. On November 29, 2023, Defendants submitted a letter attaching the certification and further arguments on this point. Dkt. No. 360. Plaintiff objected again in his December 1, 2023 letter. Dkt. No. 362.

During a pretrial conference on December 11, 2023, I heard oral argument on the pending motions *in limine* and the admissibility of the performance reviews as business records. At the conference, I previewed my rulings on a number of the motions *in limine* and the business records question. Defendants subsequently submitted an amended certification for the performance reviews. Dkt. No. 368. I have reviewed all these materials and heard the parties' arguments, and I am prepared to rule on the motions today.

The parties are familiar with the underlying facts. Therefore, I will not recite those in detail. To the extent that any additional facts in this case are pertinent to my decision, those facts are embedded in my analysis.

Two, Legal Standard. "The purpose of an *in limine* motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Hart v. RCI Hospital Holdings, Inc.*, 90 F. Supp. 3d 250, 257-58 (S.D.N.Y. 2015) (quoting *Highland Capital Management, L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008)). "Evidence should not be excluded on a motion *in limine* unless such evidence is 'clearly inadmissible on all potential grounds.'" *Id.* (quoting *Nat'l Union Fire Insurance Company of Pittsburgh, Pa. v. L.E. Myers Company Group*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996)). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. See National Union Fire Insurance Co., 937 F. Supp. at 287 (citation omitted). Further, "[a] ruling [on a motion *in limine*] is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the [party's] proffer." *Luce v. United States*, 469 U.S. 38, 41 (1984).

The Federal Rules of Evidence govern the admissibility

of evidence at trial. Under Rule 402, evidence must be relevant to be admissible. Fed. R. Evid. 402. The "standard of relevance established by the Federal Rules of Evidence is not high." *United States v. Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985). If the evidence has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action," it is relevant. Fed. R. Evid. 401. Nonetheless, under Rule 403, relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of one or more of the following: Unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed R. Evid. 403.

The Second Circuit has instructed that "[d]istrict courts have broad discretion to balance probative value against possible prejudice" under Rule 403. *United States v. Bermudez*, 529 F.3d 158, 161 (2d Cir. 2008) (citation omitted). Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be unfair. See Fed. R. Evid. 403; Weinstein's Federal Evidence Section 403.04(1)(a) (2019) (citing cases). "The unfairness contemplated involves some adverse effect beyond tending to prove a fact or issue that justifies admission." *Costantino v. David M. Herzog*, M.D., P.C., 203 F.3d 164, 174-75 (2d Cir. 2000). Further, as the advisory committee notes to Federal

Rule of Evidence 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

3, Defendants' Motions *in Limine*. A. Defendants' Motion *in Limine* No. 1.

Defendants' first motion *in limine* seeks to exclude evidence, testimony, or argument relating to Plaintiff's dismissed discrimination claims. Motion at 1-2. In their reply, Defendants clarify that they are seeking to exclude a "narrow set of evidence," consisting of evidence relating to alleged comparators or statistical or quantitative information regarding other Black or minority associates at Davis Polk, media articles concerning the legal profession and implicit bias or diversity in the profession, and documents related to the September 2015 Black Affinity Group and Diversity Committee meeting. Reply at 1-4. This motion is granted, with the qualifiers and some exceptions that I will describe.

As an initial matter, I want to frame this motion narrowly, as the defendants have done in their briefing. There is no dispute that any evidence, testimony, or argument that only goes to proving or disproving Plaintiff's discrimination claims but not retaliation claims is inadmissible under the Federal Rule of Evidence 403 balancing test. Those claims have been dismissed, and it would confuse the issues to permit

Plaintiff to try claims that have been dismissed. The parties do not disagree about this. But I should not categorically exclude evidence of the underlying discriminatory conduct that triggered the plaintiff's alleged protected activity. As the Supreme Court of the United States has emphasized, "The significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Burlington North & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006).

"The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."

Id. ; see also *Orsaio v. New York State Department of Corrections & Community Supervision*, 2022 WL 351827, at *3 (N.D.N.Y. Jan. 14, 2022) (permitting some evidence of

background for plaintiff's complaints based on sexual orientation), aff'd, 2023 WL 3410554 (2d Cir. May 12, 2023).

Evidence of the underlying discriminatory conduct that triggered the plaintiff's alleged protected activity cannot be excluded categorically. It is relevant to the retaliation claim that remains to be tried. The parties agree that it is irrelevant whether plaintiff was correct in accusing Defendants of discriminatory behavior. See Opposition at 2. The parties dispute, however, to what extent evidence of Plaintiff's state of mind is relevant. At least, originally they disputed that. Plaintiff argues that it is relevant at least in part to show his "motivations and reasonable good faith belief that he and others were being discriminated against at Davis Polk" and "the reasons he expressed his concerns and made complaints." Opposition at 3. In their Reply, Defendants argue that Plaintiff's state of mind is irrelevant to proving his retaliation claims. Reply at 4.

At the December 11 conference, however, Defendants conceded that, to succeed on a claim of retaliation under Title VII, plaintiff must prove that his complaint of discrimination was "motivated by a good faith, reasonable belief that the underlying employment practice was unlawful." *Zann Kwan v. Andalex Group LLC*, 737 F.3d 834, 843 (2d Cir. 2013) (citation omitted); see also *Kelly v. Howard I. Shapiro & Assocs. Consulting Engineers, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) ("An

employee's complaint may qualify as protected activity, satisfying the first element..., so long as the employee has a good faith, reasonable belief that the underlying challenged actions of the employer... [were] made unlawful by Title VII." (citation omitted)). "The reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." Kelly, 716 F.3d at 14-15. Therefore, for the purposes of this motion *in limine* at least, I will note that I believe that Plaintiff's state of mind is relevant to his case.

Defendants cite to *Potenza v. City of New York*, but that case is inapposite. 2009 WL 2156917, at *6 (E.D.N.Y. July 15, 2009). There, the court excluded evidence of a non-party witness receiving potentially retaliatory threats, because that was irrelevant to demonstrate plaintiff's injuries from the alleged retaliatory acts. *Id.* The Court also noted that the plaintiff's perception of the threats against another individual was irrelevant to determining whether the threats were adverse employment actions. *Id.* What is at issue now, however, is Plaintiff's state of mind to show that he engaged in a protected activity, an entirely different analysis. Defendants' citation to *Gronowski v. Spencer* for the proposition that the employer's state of mind is relevant to a retaliation claim also misses the point. 424 F.3d 285, 293 (2d Cir. 2005). That is not the issue. Gronowski does not discuss whether the employee's state of mind is relevant to a

retaliation claim.

Evidence regarding the context of the plaintiff's alleged protected activity, including the alleged discriminatory conduct that led him to complain, may be introduced. On the other hand, the Court must remain vigilant against unfair prejudice to Defendants, so that evidence does not "unduly inflame the passion of the jury, confuse the issues before the jury, or inappropriately lead the jury to [reach a verdict] on the basis of conduct not at issue in the trial." *United States v. Quattrone*, 441 F.3d 153, 186 (2d Cir. 2006).

I provide all of this discussion as context for my ruling on the defendant's motion *in limine*. Notwithstanding the broad heading that Defendants used in their briefing to headline this motion ("To Exclude Evidence, Testimony, or Argument Relating to the Dismissed Discrimination Claims"), I understand it to be cabined to the specific categories of evidence identified in the motion itself and the Reply, not a broad application to exclude all evidence of discrimination at the firm, as plaintiff has construed the motion.

With this framework established, I will now turn to the specific evidence at issue.

1.Purported Comparators' Performance Reviews.

Defendants' motion to exclude the performance reviews of alleged comparators is granted. The parties spend a lot of their focus on debating the admissibility of the performance

reviews of other Davis Polk associates, such as those found at PTX523 and PTX555. Plaintiff is precluded from introducing all such reviews as part of his direct case in chief. At the outset, these reviews have very limited probative value. As plaintiff acknowledges in his opposition, plaintiff received these reviews in the discovery process. Opposition at 6-7. Plaintiff has not proffered any basis to conclude that plaintiff knew of the content of these reviews at the time that he engaged in his protected activity. They have essentially no probative value with respect to whether he had a reasonable belief that he was engaged in protected activity at the time. Therefore, the principle probative value of these reviews would be to show that Davis Polk did, indeed, discriminate. To the extent that this evidence has any probative value here, it is substantially outweighed by countervailing considerations of prejudice, jury confusion, wasting time, and the like for a substantial number of reasons. I will outline some here.

First, the Court has concluded that the purported comparators were not shown to have been sufficiently similarly situated to plaintiff to constitute proper comparators for purposes of supporting Plaintiff's discrimination claim. Plaintiff cannot now introduce this evidence for the purpose of proving that it is more likely than not that his beliefs regarding the content of his protected activity were reasonable. The comparator evidence does not sufficiently

support a claim that Defendants engaged in discrimination. Permitting Plaintiff to attempt to prove through these reviews that Defendants engaged in discrimination-the dismissed claims-would result in substantial jury confusion. Plaintiff's other argument regarding the probative value of the introduction of these reviews shows that the probative value of the reviews themselves is very limited. Plaintiff argues that the reviews are evidence of the firms' review practice and the components of a review. But, as we have discussed, there are numerous witnesses who have been identified by plaintiff who can speak about the review process as a whole. The marginal probative value of introducing up to 100 individual exhibits of people not otherwise involved in this case to illustrate the review process as a whole is very limited.

Moreover, the introduction of these reviews would risk confusing the issues and a profound waste of time. Plaintiff's exhibit list includes nearly 100 exhibits reflecting performance reviews for the alleged comparators. The introduction of all of the proposed comparator evidence would result in a substantial waste of time and encourage juror confusion. That is not only because of the volume of the exhibits, but because the introduction of each of these reviews would invite mini-trials regarding the nature of the substance of the work done in each of the reviews, the background of the person doing the work, and the like. For example, even if

Plaintiff were to offer up an associate in the same year who received poor performance reviews but was not terminated from employment–which could make the performance review at question arguably more probative than others–the parties would still have to engage in whether that associate's performance review was warranted, whether it differed in material parts from Plaintiff's, whether that associate's review reflected more complex or difficult assignments compared to Plaintiff's, and other fact-intensive questions. Engaging in such "mini-trials" would have limited probative value but bring significant concerns of unduly prejudicing Defendants by having them defend their treatment of other non-parties, confusing the jury as to the issues to be decided, and ultimately wasting the jury's time. See, e.g., *Dooley v. Columbia Presbyterian Medical Center*, 2009 WL 2381331, at *2 (S.D.N.Y. July 29, 2009) (holding that evidence of different error with other patients in medical malpractice suit was inadmissible where the doctor "would be forced to simultaneously defend against two separate sets of claims, inviting a distracting 'mini-trial' into the course of the main proceedings"); *Martinelli v. Penn Millers Insurance Co.*, 2007 WL 9759057, at *7 (M.D. Pa. March 19, 2007) (excluding evidence of another employee's experience in part because "the proceeding would be unduly delayed by the resulting mini-trial, and the jury's attention would have been diverted from the real issues of this case").

Plaintiff argues that some of these reviews should be introduced for the specific purpose of attempting to show that Mr. Kreynin filled out reviews for other associates in 2016, arguably making, in Plaintiff's view, the lack of one for Mr. Cardwell for 2016 suspicious. Opposition at 9-12. Mr. Kreynin is expected to testify during trial, and the only probative value of these other reviews from the end of 2016 is their existence, not their contents. Therefore, the same Rule 403 concerns of undue prejudice, wasted time, and confusion of the issues substantially outweigh the limited probative value of the reviews.

I am not precluding the plaintiff from asking Mr. Kreynin about whether he filled out performance reviews for other associates, and I leave open what I would permit to be shown to him to refresh his recollection or to impeach him on his testimony in response to the question. But at this point, all of the concerns that I identified earlier regarding the introduction of these performance reviews substantially outweigh the very limited probative value for which the plaintiff seeks to introduce them, which is just to prove that Mr. Kreynin completed reviews for other associates in 2016. The content of the reviews has very little probative value.

In any case, I also note that plaintiff has asserted that his performance reviews are inadmissible hearsay. While I will address that objection later, I will note that Plaintiff's

objections apply just as much to these performance reviews. Defendants' Rule 902(11) certification for Plaintiff's performance reviews does not list these reviews that plaintiff seeks to enter into evidence. Therefore, at this point, plaintiff has provided the Court with no basis to conclude that the reviews constitute non-hearsay or hearsay subject to an exception.

2.Statistical Evidence and Context Evidence of Diversity in the Legal Profession.

Defendants' motion to exclude asserted "statistical" evidence about the number of Black and other minority attorneys at Davis Polk and in the legal industry at large is granted. This evidence has some, but limited, probative value: That probative value is substantially outweighed by the countervailing considerations described in Rule 403. At the outset, the protected activities that plaintiff engaged as alleged in the complaint did not involve complaints regarding the number of Black or other minority associates at the firm. See Dkt. No. 305 ("Summary Judgment Opinion") at 46. Therefore, the evidence regarding the number of minority associates and partners at the firm and in the legal industry as a whole provides some context for Mr. Cardwell's alleged protected activities, but they are not the subject of such protected activities. Thus, the probative value of this evidence is limited. And detailed information about those

statistics is not necessary in order to provide the context for the plaintiff's protected activity.

But there are other substantial risks of introducing this evidence that outweigh its probative value. First, this evidence risks undue prejudice, juror confusion, and wasting time. At the outset, this trial is about the retaliation claims brought by plaintiff. Big law is not on trial here for the lack of its racial diversity. Plaintiff's desire to introduce evidence of the lack of representation of minority groups in the legal industry at large and at Davis Polk in particular raises profound concerns that plaintiff seeks to introduce the evidence in order to suggest a verdict based on improper purposes-namely, to punish Davis Polk and the legal industry for its lack of diversity. Suggesting a verdict on those grounds would be unduly prejudicial, confusing, and waste the jury's time. It appears that the purpose and effect of the introduction of this evidence is to "inflame the passion of the jury... or inappropriately lead the jury to render a decision on the basis of conduct not at issue." Dooley, 2009 WL 2381331, at *1. The evidence that Defendants seek to exclude is highly suggestive of a desire by plaintiff to litigate his remaining claim on that basis, which is unduly prejudicial. Second, again, the discrimination claims themselves have been dismissed. In dismissing those claims, I noted that the probative value of the purported "statistical" evidence was

very limited-it was just raw data without any kind of analysis or controls. See, e.g., Summary Judgment Opinion at 43. Third, the introduction of the kind of numerical evidence that plaintiff wishes to present will lead to a waste of juror time and confusing the issues as the defendants respond with their own evidence. For example, defendants' answer to the EEOC charge touts the Firm's many alleged good works in the diversity space, and its high percentage of new diverse partners and the diversity of its associate staff. The introduction by plaintiff of this category of evidence only invites expansive, time wasting, and juror-confusing response by Defendants to rebut it and its imputations.

This categorical ruling applies to many exhibits and areas of proposed testimony.

Because the parties have identified several specific exhibits in their briefing, I will respond to those arguments now. The public articles that the parties cite to have very little probative value to the case and carry significant risk of undue prejudice or confusion for the reasons that I have described. See PTX107, PTX137. For example, the diversity of Davis Polk's partnership is not an issue at trial, but it may inflame the biases of jurors or confuse them as to whether it is relevant to determining Plaintiff's claims. To the extent that plaintiff discussed one of the articles with defendant Mr. Reid, plaintiff may elicit testimony as to the contents of

that discussion. See Opposition at 4. The articles themselves are also hearsay, to the extent that plaintiff seeks to introduce them for the truth of the contents of the articles, and plaintiff does not argue otherwise. See Opposition at 5. Therefore, these articles are also excluded.

As for certain documents related to the September 2015 Black Affinity Group and Diversity Committee meeting, plaintiff argues that they are relevant for showing that Davis Polk "was systematically and routinely seeking and receiving feedback from the Firm's minority affinity groups and routinely providing reports to the Management Committee about the concerns and feedback they received." Opposition at 3 n.3. At the December 11 conference, plaintiff was not able to proffer any significant probative value for most of these documents.

For PTX220, an email invitation to the September 2015 meeting, and PTX221, an agenda for the same meeting, plaintiff argued that the documents were relevant to show defendants' knowledge of protected activity in the September 2015 meeting, including that Alicia Fabe coordinated the meeting. But the email invitation and agenda themselves, which precede the September 2015 meeting, do not show any evidence of Plaintiff's alleged protected activity, nor any follow-up that might demonstrate defendants' knowledge of such activity. Multiple witnesses, including plaintiff himself, are expected to be able to testify regarding the attendance at, contents of, and

follow-up to the September 2015 meeting. At most, these documents may simply be necessary to refresh the recollection of a witness. Therefore, plaintiff has not shown any probative value for these documents as exhibits, and any limited probative value will be significantly outweighed by the risks of cumulativeness and wasted time.

For PTX223, PTX305, and the attached PTX306, the Court finds that plaintiff has made enough of a showing of potential probative value that they should not be excluded at this time. PTX223 contains handwritten notes from Ms. Fabe from the September 2015 meeting, including the memorialization of Plaintiff's alleged protected activity. PTX305 and PTX306 contain a slide deck purportedly presented by the Diversity Committee to the Management Committee at Davis Polk, along with its cover email, that in part references "suggestions/concerns" raised at the September 2015 meeting, arguably suggesting that the recipients were already aware of the September 2015 meeting and its contents. Therefore, these documents appear to be potentially relevant to Plaintiff's claims and do not appear to be substantially outweighed by a countervailing concern at this time.

Finally, PTX465 and PTX484, which contain email correspondence related to a presentation made to a different affinity group at Davis Polk and a list of affinity group or diversity events, respectively, are excluded. Plaintiff argue

that these documents demonstrate the firm "culture," including a "pattern" of affinity groups sharing concerns to the firm leadership and of the firm tracking affinity group or diversity-related events. But these have limited, if any, probative value. Again, the trial is focused on certain of plaintiff's actions and the firm's reactions to those actions, not the firm's involvement in other affinity groups or diversity efforts in general. Plaintiff did not proffer any probative value these documents would provide to Plaintiff's case. On the other hand, introducing these documents would only invite substantial risks of confusing the jury and wasting time.

The Court clarifies that excluding these specific categories of evidence does not foreclose plaintiff from introducing some context, for example through his own testimony on the stand, for his retaliation claims that might also touch upon what would have been his discrimination claims. In particular, as noted, plaintiff must show that he was "motivated by a good faith, reasonable belief that the underlying employment practice was unlawful," and the "reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." Zann Kwan, 737 F.3d at 843; Kelly, 716 F.3d at 14-15. And I am specifically not excluding all evidence of the types of issues that the Diversity Committee and Mr. Cardwell were working to address -

the Court is not now precluding plaintiff from testifying about his perceived need to increase the diversity of the legal profession as part of the description of his work in furtherance of that goal at the firm, nor am I precluding the elicitation of such evidence from others. That the Diversity Committee was working to enhance the diversity of the firm is arguably an important piece of contextual information. But the categories of evidence just discussed are not needed to tell that story or to provide the needed context for Plaintiff's alleged protected activity. The Court will make a case-by-case determination at trial as to other specific testimony and evidence.

Accordingly, the Court grants in part and denies in part defendants' first motion *in limine*.

B. Defendants' Motion *in Limine* No. 2.

Defendants' second motion *in limine* seeks to preclude plaintiff from presenting arguments or evidence of alleged adverse employment actions that the Court has already dismissed. Motion at 8. This motion is granted.

As the defendants argue, plaintiff originally presented 11 purported adverse actions in support of his retaliation claims. The Court held that six of them did not constitute adverse employment actions either as a matter of fact or as a matter of law. Summary Judgment Opinion at 60-61. Because the Court has held that those actions are not adverse

employment actions, plaintiff may not argue at trial that any of those actions constituted an adverse employment action. See, e.g., *Rhee-Karn v. Lask*, 2023 WL 4238908, at *2 (S.D.N.Y. June 28, 2023) (precluding arguments of dismissed claims as moot).

Plaintiff's only objection is that defendants' motion is overbroad and too generalized, and that the Court must make a case-by-case determination based on the specific evidence at issue. Opposition at 16-17. But I think that on this too, plaintiff's opposition misreads the motion. Defendants have not moved for the Court to exclude evidence of each of the events that they listed: They have only moved to preclude evidence or argument that they constituted adverse employment actions. The facts may have relevance in proving other parts of the parties' claims. For example, Mr. Chudd and Ms. Hudson's reviews are not retaliatory actions in themselves, but they may have probative value to determining whether plaintiff's eventual termination (and other alleged adverse employment actions) were justified or retaliatory. And as the Court previously recognized, defendant Mr. Reid's alleged comment to plaintiff that he would be "out of the game," too, is not a retaliatory act in itself but could be probative for understanding whether defendants' other alleged adverse actions were retaliatory in nature. So, again, I am granting Defendant's motion, which is to prevent the plaintiff from

contending that the incidents listed in their motion constituted adverse employment actions. In granting the motion, I am not precluding the introduction of these facts for other purposes.

C. Defendants' Motion *in Limine* No. 3.

Defendants' third motion *in limine* seeks to exclude testimony and evidence of plaintiff's "moral" or "good character." Motion at 11. This motion is granted. But again, I am concerned that plaintiff has misconstrued the scope of the motion itself, so I will spend a little time reminding the parties that I am granting only the motion made, which is to exclude the introduction of evidence to show Plaintiff's character.

Federal Rule of Evidence 404(a)(1) provides that "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." However, any party "may attack the witness's credibility," or a witness's truthfulness or untruthfulness may be presented in certain circumstances. See Fed. R. Evid. 404(a)(3), 607, 608. Therefore, any evidence or argument that Mr. Cardwell was a "good" "moral" person or that he had a positive reputation is properly excluded, as defendants argued in their motion. Reputation or opinion testimony regarding plaintiff's character would have very limited probative value for the issues in the

case, and any such probative value is substantially outweighed by the risk of confusing the jury and confusing the issues presented. Reputation evidence regarding his truthfulness might be introduced under some circumstances - see FRE 608 - but evidence of his alleged "good" character is not to be admitted.

Plaintiff's opposition again confuses the issue presented by defendants' motion. Plaintiff argues that he should be permitted to present specific evidence regarding the work that he did at the firm. But the specific evidence that he cites is not character or reputation evidence that would be excluded as a result of the motion - it is evidence about things that he did at the firm. See, e.g., Opposition at 17-18 (referring to evidence, for example, of defendants' "positive and favorable assessments and discussions about Plaintiff's competencies"). Plaintiff cites several specific exhibits in his opposition as well, none of which were described in defendants' motion as having been the target of this motion. Since plaintiff raised the admissibility of certain exhibits, defendants responded. As they describe, some of that evidence may be properly admissible as evidence "that plaintiff was engaged in diversity and inclusion activities outside of work." Plaintiff misapprehends the nature of the motion.

The same is true with respect to prospective evidence regarding plaintiff's concern that the effect of this motion

in limine would to preclude him from offering evidence related to his "understanding, training and expertise concerning Davis Polk and law firm dynamics." This is not testimony about his reputation for being a good or moral person, and was not the subject of the motion. On this point too, plaintiff seems to misapprehend the nature of the motion and what it sought to preclude.

But I think that it is important for me to comment briefly on one part of this argument: Mr. Cardwell has not been qualified as an expert witness by the Court. He is a lay witness and may, as a result, testify about things that a lay witness can testify about. In particular, I do not understand that he has disclosed himself as an expert in the area of "law firm dynamics." I have not found him to be qualified as an expert in that arena or any other. As far as I know, Mr. Cardwell only worked at one law firm, he made it through only four years, and his experience at a single law firm does not seem to qualify him as an expert in "law firm dynamics" generally. I flag this issue because I am concerned that Mr. Cardwell may believe that he can testify as if he were a qualified expert - he may not unless I permit him to do so. And he has made no application to permit him to do so.

The parties discuss one letter by Sheila Adams, a black attorney who was a senior associate during the relevant time and is currently a partner at Davis Polk. At the December

11 conference, plaintiff stated that the letter will not be presented as evidence, but Ms. Adams will be questioned about it. The letter is quoted in the parties' pleadings as describing Mr. Cardwell's "ability to connect people to actionable ideas," "exhibit leadership among more senior attorneys and partners," and help Ms. Adams as a "go-to person for key decision points... [in] navigating the politics of potential partnership consideration or troubleshooting ways to get better to ensure the success of our diverse peers." Motion at 12; Opposition at 18. The Court recognizes that testimony and evidence regarding Mr. Cardwell's active involvement in the local city bar association and Davis Polk's associate community, particularly in pushing forward diversity and inclusion initiatives at Davis Polk, may have some probative value for Plaintiff's case. But, again, this is not reputation or character evidence.

Accordingly, the Court grants defendants' third motion *in limine*.

D. Defendants' Motion *in Limine* No. 4.

Defendants' fourth motion *in limine* seeks to exclude, in essence, evidence, testimony, or argument related to any alleged discrimination or retaliation experienced by any other Davis Polk employee. Motion at 13-20. This motion is granted in part and denied in part.

Federal Rule of Evidence 404(b) provides that

"evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, the "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* at 404(b)(2). "The Second Circuit's 'inclusionary' rule allows the admission of such evidence 'for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403 of the Federal Rules of Evidence.'" *United States v. Greer*, 631 F.3d 608, 614 (2d Cir. 2011) (quoting *United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994)). "The district court has wide discretion in making this determination...." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000).

In order to assess the admissibility of "other acts" evidence under Rule 404(b), a district court follows a multi-step process:

First, the district court must determine if the evidence is offered for a proper purpose, one other than to prove the defendant's bad character or criminal propensity. If the evidence is offered for a proper purpose, the district court must next determine if the evidence is relevant to an

issue in the case, and, if relevant, whether its probative value is substantially outweighed by the danger of unfair prejudice. Finally, upon request, the district court must give an appropriate limiting instruction to the jury.

United States v. Pitre, 960 F.2d 1112, 1119 (2d Cir. 1992); accord *United States v. Schlussel*, 2008 WL 5329969, at *2 (S.D.N.Y. Dec. 15, 2008). "Even under th[e] [inclusionary] approach, however, district courts should not presume that [other act] evidence is relevant or admissible." *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011).

Plaintiff argues that he should be permitted to introduce evidence of "other associates' concerns and Defendants[']knowledge of such concerns." Opposition at 20. He claims that such evidence is relevant to the jury's assessment of defendants' credibility. *Id.* He also argues that this category of evidence will help provide context for a series of specific acts taken by Defendants. *Id.* at 19-20.

The probative value of this evidence is very limited. At the outset, plaintiff does not identify any specific testimony that he wants to provide regarding "other associates' concerns" other than the existence of the *Martinez* litigation, which I will discuss in more detail in a moment. Absent a proffer regarding the specific nature of this evidence, the Court does not ascribe it substantial probative value. Second, to the extent that plaintiff is suggesting that he may talk

about things that other associates told him they experienced, that will likely introduce substantial hearsay issues. (As an aside, such evidence would have to be offered for the truth of the matter asserted in order to be considered by the jury, as plaintiff argues, to evaluate the credibility of defendants' testimony.)

In the absence of any proffer by plaintiff regarding other evidence that he might offer with probative value in response to this motion, the parties focus on the admissibility of the decision *Martinez v. Davis Polk & Wardwell LLP*, a discrimination and retaliation action brought against Davis Polk that was ultimately dismissed on summary judgment. 208 F. Supp. 3d 480 (E.D.N.Y. 2016), aff'd, 713 F. App'x 53 (2d Cir. 2017).

At the December 11, 2023 hearing, plaintiff stated that he is not seeking to admit any of the filings in the case, other than for impeachment. Plaintiff argues, however, that general facts about the case and defendants' awareness of the case during relevant time periods should be admitted. Specifically, plaintiff points out that Davis Polk filed its motion for summary judgment in August 2015, one month before Mr. Cardwell made his September 2015 alleged complaint and before Plaintiff's unscheduled mid-year review in June 2016. *Id.* at 20-21. The *Martinez* case's retaliation claim was dismissed, and affirmed, on the grounds that the unfavorable

performance review the plaintiff received after filing her EEOC charge was not a retaliatory action because the plaintiff already knew to expect the unfavorable review at the time she filed her EEOC complaint. *Martinez*, 208 F. Supp. 3d at 489-90. The Second Circuit, on appeal, also noted that the plaintiff had received some critical feedback in her performance reviews prior to her EEOC filing. *Martinez*, 713 F. App'x at 57.

During our conference on December 11, plaintiff agreed that he would not offer the filings in *Martinez*, except, again, potentially for impeachment purposes. Plaintiff's decision not to offer the filings in the *Martinez* case in this case makes good sense. Those have very little probative value. Introducing such documents carries significant risk of distracting the jury from the merits of plaintiff's case and therefore wasting the jury's time and confusing or misleading the jury with the arguments and allegations of a separate, distinct case that is not at trial. The court filings, which may appear official and formal, may also carry the risk of carrying undue weight with the jury, whether it be to give extra weight to the factual allegations within or to the ultimate dismissal of the case. The former scenario presents a risk of inflaming prejudices against defendants, while the latter could unfairly prejudice plaintiff by suggesting that his case, too, may fail. The extremely limited probative value of the filings in the *Martinez* case, if any, are substantially

outweighed by the risk of undue prejudice, confusing the jury and the other concerns described in Rule 403. So, I appreciate plaintiff's concession that he will not offer them.

The probative value of the facts underlying the *Martinez* lawsuit is extremely limited. First off, the case bears very little factual similarities to this matter. It does not involve a claim of discrimination by a lawyer, but by a non-lawyer employee of the firm. The are no substantial similarities regarding the nature of the allegations asserted. The relevant time period ended in about 2013, before Mr. Cardwell's time at the firm, and involved allegations of low pay and lack of promotions rather than termination. Motion at 17. Second, the case was dismissed, so the claims were not found to have any merit-the mere fact that a lawsuit was brought does not mean that the party named as a defendant engaged in the conduct asserted in the complaint.

However, the fact that *Martinez* was a public lawsuit alleging discrimination and retaliation against defendant Davis Polk could be probative of defendants' heightened sensitivity to similar allegations and, support plaintiff's contention that defendants learned from the case that ginning up fake performance reviews would protect them in potential future litigation brought by plaintiff. In particular, as plaintiff argued at the December 11 conference, the central role of performance reviews in the *Martinez* dismissal, which occurred

in September 2016, could arguably be probative to defendants' state of mind in giving plaintiff negative performance reviews in the fall of 2016 and at his December 2016 annual feedback meeting, provided that plaintiff is first able to introduce evidence of defendants' knowledge of *Martinez* at trial. Notably, plaintiff alleges that, on November 7, 2016, Mr. Bick specifically asked that Mr. Cardwell be added to a list of M&A associates who would receive a performance-based mid-year review in 2017, though he was not initially on the list. Dkt. No. 220 282-283.

Therefore, the probative value of a fact, if proven, that the actors at Davis Polk were aware of the value of adverse performance reviews in rebutting claimed retaliation is real. The defendants' alleged knowledge of that fact by itself, it does not necessarily risk the same degree of prejudice as the introduction of the content of the filings in that case.

On the other hand, given the differences in the nature of the facts, the probative value of the particular facts of the *Martinez* case is not as great as the plaintiff posits: in particular, the *Martinez* case did not involve a lawyer, so the argument that the partners learned from the existence of *Martinez* that they should drum up negative reviews for Mr. Cardwell is weaker. And, as defendants argued at the December 11 conference, defendants could suffer undue prejudice

by the introduction of the *Martinez* case by putting into the jury's mind that defendants have dealt with similar lawsuits and complaints of employment discrimination. Still, recognizing these distinctions, I believe that the evidence of the existence of the Martinez action should be excluded, but listen to the scope of exclusion here, after applying the Rule 403 balancing test. The prejudicial effect of the fact of a particular lawsuit substantially outweighs the probative value. Evidence of the fact of a lawsuit against the firm raises the prospect that the jury will render a verdict against Davis Polk and the other defendants on the basis of conduct that's not at issue here in this case-conduct that was shown to be unsubstantiated and that was, in any event, factually distinct from the allegations in this case. Mentioning a particular lawsuit opens the door to the kind of mini-trial that I described earlier, even if the filings themselves are not admitted, the parties, in particular the defendants, will likely want to elaborate on the nature of the underlying claim and its merit in order to rebut an argument that the claim had merit. That reaction, which would be natural and understandable, would result in a substantial waste of time and confuse the issues for the jury.

So, in sum, I am going to grant the motion in part insofar as it pertains to the particular *Martinez* litigation. Again, I want to be clear that I am not excluding examination

now regarding the defendants' motivations, and their general understanding about potential risks to the firm and themselves when handling a claim of discrimination, including the prospect of litigation generally. I am limiting references to to the *Martinez* litigation in particular, as follows:

Plaintiff may inquire of pertinent witnesses whether they were aware of the existence of a litigation against Davis Polk for retaliation; that the claim was unsuccessful; and that part of the reason for the fact that the claim was unsuccessful was the fact that the firm had kept adverse performance reviews. I think that this limited line of inquiry should suffice to elicit the probative value of the defendant's understanding of the case or knowledge of the case without opening the door to an extensive exploration of the case or its facts. Further inquiry regarding the case might be permitted to refresh a witnesses' recollection. Permitting this limited set of information about *Martinez* will also curb, I hope, the danger of any wasted time and confusion to the jury.

SO I'm going to grant in part and deny in part and denies in part defendants' fourth motion *in limine*. If the defendants wish for the Court to administer any kind of a limiting instruction regarding this, you make such a request. I'd be happy to answer more questions about this at a later point.

E. Defendants' Motion in Limine No. 5.

Defendants' fifth motion *in limine* seeks to exclude Plaintiff's EEOC and NYSDHR submissions as well as the EEOC's "right to sue" letter. Motion at 20-21. This motion is granted, but specifically as to the use of these documents as evidence for plaintiff's case.

Plaintiff filed his complaint with the EEOC (the "Charge") on August 3, 2017, filed a written rebuttal to Davis Polk's response on January 10, 2018, and filed a supplemental charge with the EEOC on April 25, 2018. Motion at 20-21. Plaintiff has listed the parties' submissions to the EEOC (which were referred to the NYSDHR) among his exhibits. See PTX118, PTX120, PTX121.

Plaintiff cannot offer these submissions as evidence of the truth of the matter asserted in the submissions because they are inadmissible hearsay under Federal Rules of Evidence 801 and 802.

Plaintiff does not dispute this and instead argues that he would introduce the submissions not for the "truth of the matter asserted" but because their existence, essentially, is relevant to his claims. Opposition at 22-23. The Court agrees in part, in that the fact that plaintiff filed his Charge with the EEOC on August 3, 2017, and filed a rebuttal on January 10, 2018, as well as the general nature of the allegations and arguments in these submissions, is highly probative to his case.

The Charge is an alleged protected activity. The timing of these actions is also in close proximity to the negative performance review plaintiff received during his annual meeting on January 11, 2018 as well as his receipt of the "time to go" meeting from Davis Polk on February 8, 2018. See, e.g., *Zann Kwan*, 737 F.3d at 847 (finding that "the very close temporal proximity between [plaintiff's] protected conduct and her termination" helps defeat summary judgment on a retaliatory termination claim).

However, the Court finds the remainder of plaintiff's arguments as to why his EEOC and NYSDHR submissions are relevant to his case to be unpersuasive. The submissions themselves are not required for plaintiff to establish that he engaged in protected activity, as he and others can simply testify to the dates and other relevant facts as needed.

Also, the EEOC's "right to sue" letter has no probative value. "Its sole purpose is to prove that plaintiff has satisfied the jurisdictional prerequisites to bringing suit, and that is not an issue for the jury." *Elam v. Concourse Village, Inc.*, 2017 WL 1383984, at *2 (S.D.N.Y. April 7, 2017).

On the other hand, the probative value of the introduction of this such evidence is substantially outweighed by the risks of undue prejudice, confusing the issues, and misleading the jury, as well as resulting in wasted time.

Plaintiff's submissions contain arguments and assertions that are not at issue in this trial - including facts that refer to the underlying claims of discrimination that have been dismissed. Indeed, such submissions as the ones at issue are routinely excluded from employment cases. See, e.g., *Reilly v. Revlon, Inc.*, 2009 WL 2900252, at *2 (S.D.N.Y. September 9, 2009).

Accordingly, the Court grants defendants' fifth motion *in limine* as to plaintiff's use of his submissions to the EEOC and NYSDHR and the EEOC's "right to sue" letter as evidence for his case. The probative value of the evidence at issue is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, and wasting time.

To clarify, however, plaintiff may induce testimony regarding the basic facts of his EEOC submissions. Defendants may also use plaintiff's charge as non-hearsay evidence or for impeachment, provided that other admissibility requirements are met. See Fed. R. Evid. 801(d)(2).

Separately, I understand that defendants offered to stipulate to the underlying facts involving the EEOC charge, including its date, and that plaintiff refused to do so. To the extent the decision not to agree to the proposed stipulation was influenced by a desire to strengthen the argument for the introduction of the documents themselves, I encourage plaintiff to reconsider whether he is willing to

stipulate to the pertinent undisputed facts.

F. Defendants' Motion *in Limine* No. 6.

Defendants' sixth motion *in limine* seeks to exclude Davis Polk's answer (the "answer"), found at PTX115, submitted on December 5, 2017 in response to Plaintiff's EEOC Charge. Motion at 25-30. This motion is granted in part and denied in part.

As an initial matter, defendants acknowledge that the answer is admissible as a party admission for Davis Polk under Federal Rule of Evidence 801(d)(2). Defendants contest the admission of the answer for individual Defendants Mr. Reid, Mr. Bick, or Mr. Brass. Reply at 12 n.8. At the December 11 conference, plaintiff also confirmed that he is only seeking to admit portions of the factual background in the answer, namely Section III.B to E.

Inconsistencies between Davis Polk's answer and defendants' later explanation of the reasoning for the firm's termination of plaintiff may be probative of their motive and potential pretext for any retaliatory action. In *Zann Kwan*, the Second Circuit explicitly pointed to inconsistencies in the offered reason for the plaintiff's termination from the defendant company between the defendant's EEOC submission and the defendant's representations during discovery and found that, "based on the discrepancies between the EEOC statement and subsequent testimony, a reasonable juror could infer that

the explanation given by the defendant was pretextual." 737 F.3d at 847; see *Graziadio v. Culinary Institute of America*, 817 F.3d 415, 430 (2d Cir. 2016) (quoting Zann Kwan).

Defendants acknowledge this, both in their briefing and at the December 11 conference. However, defendants argue that Davis Polk has been consistent in its explanation for plaintiff's termination and that therefore this principle is not applicable. At the December 11 conference, plaintiff specifically asserted that the answer is inconsistent in two places in which quoted language appears, describing Mr. Cardwell's performance at Davis Polk in his initial years at the firm, and the answer then represents that: "The firm delivered this feedback to Cardwell at the end of his credit rotation, as part of its routine professional development and training initiatives"; and "Once again, the firm delivered this feedback to Cardwell, both in real time and at the end of his third rotation." PTX115 at 7, 9. Plaintiff argues that these two statements are inconsistent with the evidence. Plaintiff also argues that the answer's assertion that his 2016 mid-year feedback meeting was in response to Mr. Cardwell's own request for feedback was another inconsistent statement. PTX115 at 9 n.9.

All three alleged inconsistent statements, along with the surrounding context of the feedback that was purportedly delivered to plaintiff, appear at Section III.B.1 and at the

second, third, and fourth paragraphs of Section III.B.3 of the answer.

On the other hand, the Court has ruled that Davis Polk's filing of the answer is not an adverse employment action. *Id.* at *33. Introducing the action therefore carries the risk of confusing or misleading the jury into thinking that Davis Polk's answer, filed before Mr. Cardwell was terminated, constituted one of Davis Polk's retaliatory actions. Defendants argue that this danger is heightened by certain of plaintiff's pretrial submission drafts, which reflected a potential desire to reintroduce this argument into the case. Motion at 26. I have granted the motion *in limine* that precludes him from doing so.

The Introduction to the answer (Section I), the description of the parties, including Davis Polk's preening description of itself (Section II), and the recitation of Mr. Cardwell's claims (Section III.A) have very little probative value. What little value they have is substantially outweighed by the risk of confusing the jury and wasting time.

The portions of the answer (principally in Section IV of the answer) that contain the firm's legal argument have very limited probative value - they are clearly argument applying the law to the facts. That very limited probative value is substantially outweighed by the risk of confusing the jury. Similarly, the partition of the recitation of the facts that

specifically responds to Mr. Cardwell's direct claims of discrimination (Section III.E) should not be presented to the jury. That section describes complaints by Mr. Cardwell regarding allegedly discriminatory treatment that are not at issue in the case. The recitation of his complaints and the firm's response will result in undue prejudice and confuse the jury by introducing a discussion of specific allegations of discrimination that are not being tried. It may suggest a verdict on the basis of an improper purpose - namely to sanction the defendants for that asserted conduct that is not being tried.

So what might be introduced is the text in Section III.B.-D., which is the firm's description of Mr. Cardwell's work history at the firm and the firm's review of his work history. Some of that description includes allusions to plaintiff's claim of discrimination, but most of it is substantively the firm's account of Mr. Cardwell's employment at the firm. I'm not completely sure why Mr. Cardwell wants to introduce the firm's crafted description of his work history and performance, but I understand that he does. The question is whether the prejudicial effect of that is greater than the asserted probative value of the alleged discrepancy between the position that the firm took there and took at the time of his termination.

In considering the balancing factors of Federal Rule

of Evidence 403, the Court finds that the facts surrounding the answer, including when it was filed, that it generally contained Davis Polk's responses to Plaintiff's EEOC complaints against the firm, and that Mr. Reid and Mr. Bick reviewed the answer before it was filed, are admissible. As for whether the specific contents of the answer can be admitted, however, the Court finds that only those specific portions of the answer may be admitted to the extent that plaintiff can demonstrate that it is inconsistent with other representations by defendants.

The only probative value of the answer itself is the degree to which it was consistent or inconsistent with defendants' representations of how Mr. Cardwell was treated, including why he received poor performance reviews and was ultimately terminated. While the Court previously identified one portion of the answer that appears to contain an inconsistency, plaintiff does not point to any other specific inconsistencies, except to vaguely allege that that the answer contains "factual inaccuracies about its own business practices (e.g., performance review system and what was communicated to Cardwell)," which appear to only go toward the details of how the performance review system mechanically operated at Davis Polk and the inconsistency the Court already flagged. Opposition at 27.

So here's what I will do, Mr. Cardwell may introduce those sections of the answer into evidence, together with the

fact of when it was filed, that it generally contained Davis Polk's responses to Plaintiff's EEOC complaints against the firm, and that Mr. Reid and Mr. Bick reviewed the answer. Again, assuming these things are true.

Plaintiff may not present evidence or argument regarding the process by which the answer was prepared or suggest that it's preparation or underlying investigation was insufficient. Plaintiff argued at the December 11 conference that the answer is probative for showing that defendants did not conduct a proper investigation of the underlying facts before making the representations in the answer. An effort to use the answer to support such an argument would be problematic and would be so confusing, and unduly prejudicial that its probative value would be substantially outweighed, justifying its exclusion.

Defendants' process of preparing the answer is not at issue at trial. To introduce such evidence or argument would take up substantial time on irrelevant issues, particularly by inviting a mini-trial into defendants' decision making process in preparing a submission for an adversarial proceeding, as they were entitled to do. It would also invite issues of privilege, which defendants are reasonably concerned about, as well as unfair prejudice and confusion of the issues by tending to suggest that defendants' conduct in preparing and filing the answer was an adverse employment action, even though the Court

has already found it is not.

So I am not excluding at this time the sections of the answer that I have described, but I am limiting the scope of evidence or argument that can be made regarding its preparation. Again, plaintiff may not argue that it was an adverse employment action or take up the jury's time with the confusing, wasteful issue of the nature of its preparation. I hope that this balances the probative value of showing the purported discrepancies between the defendant's statements in the answer and its position here to support showing of pretext, against the risk of prejudice, confusion, and wasting time.

Accordingly, the Court grants in part and denies in part defendants' sixth motion *in limine*. Specifically, plaintiff may only introduce those sections of the answer into evidence. Plaintiff may only introduce these portions for the purpose of showing defendants' alleged motive in their conduct toward Mr. Cardwell, and only to the extent that they are inconsistent with other evidence adduced at trial. Plaintiff may not use the answer to show, or present arguments on, defendants' process of preparing the answer, including any underlying investigation of the facts, or whether the answer constitutes retaliatory conduct. If a limiting instruction to the jury would be helpful to enforce these guardrails, defendants are invited to propose such an instruction.

G. Defendants' Motion *in Limine* No. 7.

Defendants' seventh motion *in limine* seeks to exclude the identity of Davis Polk's clients and details of specific client matters or representations. Motion at 31. This motion is granted.

Putting aside for now whether client identities are privileged information, plaintiff points to no concrete probative value that the identity of a Davis Polk client, and specific and potentially identifying details of client matters or representations, would have on his case. Nor can the Court identify any. Plaintiff argues that such information is relevant to provide context on the matters that he was staffed on. Opposition at 35. But Plaintiff provides no specific example or authority for this assertion. In any case, witness testimony and other evidence that describe the nature of the assignment, project, or, if relevant, the client itself would provide the probative value. For example, a witness who can describe the requirements and complexity of a specific task that was assigned to Mr. Cardwell, how he did or did not succeed at that task, and the significance of that task to a client's specific corporate deal would provide the relevant context for Plaintiff's claims. The identity of that client, however, or other details of the deal that did not affect Mr. Cardwell directly, would not add any significant probative value to the case. The Court notes that, thus far in this litigation, the parties and the Court have been able to engage

in substantive discussions over the merits of plaintiff's claims without the disclosure of a client's identity. The Court sees no reason why that cannot be maintained during trial and before the jury.

Balanced against this minimal probative value is the significant risk of unfair prejudice to defendants, given that the identity of clients may elicit biases or other preconceived notions from jurors that affect the jury's judgment but are not relevant to the case. Jurors may not like the clients for whom the defendants [and Mr. Cardwell] worked or the nature of their work. Introducing evidence of their identities might provoke decision based on an unfavorable reaction to the firm's wealthy clientele, rather than to the facts at issue. Perhaps more significantly, defendants will be forced to proceed with extreme caution at trial, to ensure that potentially privileged information and evidence are not accidentally disclosed, which may significantly impede defendants' ability to present their case.

The Court also notes that the disclosure of client identities may hamper plaintiff's presentation of his case as well, in that he is under the same obligation as other attorneys barred in New York to "not knowingly reveal confidential information... or use such information... for the advantage of the lawyer or a third person...." Rule 1.6, N.Y. Rules of Professional Conduct. "Confidential information"

includes "information gained during or relating to the representation of a client, whatever its source, that is... to be embarrassing or detrimental to the client if disclosed, or... information that the client has requested be kept confidential." *Id.*

Therefore, the probative value of the evidence at issue is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, and wasting time.

Plaintiff also does not object to defendants' request to preclude evidence, testimony, or argument regarding Davis Polk's representation of a for-profit prison. Motion at 32. Therefore, this request is granted.

Accordingly, the Court grants defendants' seventh motion *in limine*.

H. Defendants' Motion *in Limine* No. 8.

Defendants' eighth motion *in limine* seeks to exclude evidence of their post-termination, post-complaint litigation conduct, such as discovery disputes, arguments and conduct during this litigation, public statements made by defendants or their representatives, and evidence regarding defendants' counsel. Motion at 17. This motion is granted.

The last of the potential retaliatory actions taken by Defendants is Mr. Cardwell's termination. See Summary Judgment Opinion at 60-63. Mr. Cardwell was terminated, or at least

encouraged to leave, from Davis Polk on February 8, 2018, and his final day of employment at Davis Polk was August 10, 2018. *Id.* at 3. This litigation did not commence until 2019. Dkt. No. 1. How defendants have conducted themselves after Mr. Cardwell's alleged termination is not probative to proving any element of Plaintiff's retaliation claims. At most, and as defendants concede, plaintiff may be permitted to introduce statements by defendants for impeachment purposes. Motion at 35. Plaintiff's assertions that certain of defendants' post-termination statements are "relevant to the harms to plaintiff's reputation and health, as well as the liability, credibility, and state of mind of defendants and their witnesses" are vague and unsupported in the record. Opposition at 38.

On the other hand, introducing such evidence carries significant risk of confusing and misleading the jury, by presenting arguments and statements that appear to be related to but are not probative evidence to the jury's determination of Plaintiff's claims, and at the very least would result in significant wasted time. To the extent that plaintiff merely seeks to include statements by defendants that are consistent with their arguments and representations to be presented at trial, that is also cumulative.

Finally, the jury's opinions of the conduct of defense counsel would likely be unfairly prejudicial. See, e.g., *In*

re: Gen. Motors LLC Ignition Switch Litig., 2015 WL 8130449, at *5 (S.D.N.Y. December 3, 2015) ("Jurors may seek to punish [defendant] for what they view as an overly aggressive litigation strategy by a large company against two grieving parents.").

Accordingly, the Court grants defendants' eighth motion *in limine*. The probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, wasting time, and presenting unnecessary cumulative evidence.

I'm going to go off script for a brief moment. I'm going to go to talk a little bit about one of plaintiff's arguments here, which is the suggestion that this litigation and the reputational harm or the like that is associated with his prosecution of this litigation can form the basis for his damages. I may seek further briefing from the parties on that point. The question it to a degree whether all of the sequelae of alleged damages here, to the extent they are magnified by plaintiff's decision to take up this stressful and public process of engaging in this kind of litigation should be compensable or if not to the extent they grow out of a parties' choice. I may seek further briefing on that as we get toward the charge.

Thank you for indulging me with that aside. Let me turn to I.

I. Defendants' Motion *in Limine* No. 9.

Defendants' ninth motion *in limine* seeks to bifurcate the issue of punitive damages and preclude plaintiff from introducing financial information until and unless the jury determines that punitive damages are warranted. Motion at 36. This motion is granted.

Under Rule 42(b) of the Federal Rules of Civil Procedure the Court, in its discretion, can bifurcate the trial of an action for "convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Fed. R. Civ. P. 42(b). "Bifurcation requires the presence of only one of these conditions, and the decision to bifurcate a trial rests firmly within the discretion of the trial court." *Crown Cork & Seal Co. Master Ret. Tr. v. Credit Suisse First Bos. Corp.*, 288 F.R.D. 335, 337 (S.D.N.Y. 2013) (cleaned up).

"Factors to be considered include: (1) whether the issues sought to be tried separately are significantly different from one another; (2) whether the severable issues require the testimony of different witnesses and different documentary proof; (3) whether the party opposing the severance will be prejudiced if it is granted; and (4) whether the party requesting the severance will be prejudiced if it is not granted."

Lewis v. Triborough Bridge & Tunnel Authority, 2000 WL

423517, at *2 (S.D.N.Y. Apr. 19, 2000) (internal citations and quotation marks omitted). The party seeking bifurcation bears the burden of establishing that bifurcation is warranted. See *id*.

Applying these factors, and as previewed at the December 11 conference, it is appropriate to bifurcate the jury's assessment of punitive damages and save the introduction of any evidence regarding defendants' financials until the jury is considering punitive damages. Defendants do not dispute that their financial status can be considered in calculating the amount of punitive damages, but point out that such evidence is irrelevant to the determination of defendants' liability and whether punitive damages are warranted. The Second Circuit has emphasized this: "Punitive damages are to be tailored to the defendant's ability to pay, and normally that class of evidence is not admitted or desirable during the liability and compensatory damages phase of the case." *Vasbinder v. Ambach*, 926 F.2d 1333, 1344 (2d Cir. 1991).

As to whether evidence of defendants' financial information can be introduced in the liability stage of the trial, plaintiff argues that such information is probative to show defendants' profit and reputation-oriented motives for engaging in the retaliatory conduct, "Defendants' conscious disregard of plaintiff's rights," "the manner and timing surrounding their decision to fire Cardwell," "incentives and

loyalties of defendants and their witnesses," and "Defendants and their witnesses' credibility." Opposition at 38-39. I think that it is true that the amount of money earned by the firm and by the individual defendants does have probative value for those reasons - their financial incentives to protect themselves and the firm may motivate their conduct here. I do not believe, however, that it is necessary to present to the jury the specific amount of the revenues of the firm or the profits per partner of each of the defendants or other witnesses.

Plaintiff also argued, at the December 11 hearing, that defendants' wealth and financial stature are probative for showing plaintiff's emotional damages, particularly in litigating against defendants throughout this case. I understand that litigation is very stressful. But plaintiff cannot recover for any emotional injuries suffered from this litigation. "The majority of courts addressing litigation-induced stress have treated it as a non-compensable component of damages regardless of whose actions necessitate the litigation." *Rainville v. Boxer Blake & Moore PLLC*, 2021 WL 949415, at *10 (D. Vt. Mar. 12, 2021). Again, I solicit further briefing on this. It appears as a result that plaintiff must disentangle emotional injury suffered from defendants' retaliatory conduct, if any, from the emotional effect of litigating this case, and present evidence only of

the former. Therefore, plaintiff's argument regarding the effect of litigating against defendants appears to have very limited probative value here.

On the other hand, introducing evidence and arguments related to defendants' wealth and financial information is likely to inflame the jury's biases and introduce the danger of having defendants' ability to pay improperly affect the jury's determination of liability and, if appropriate, compensatory damages.

Davis Polk and its partners make a gobsmacking amount of money. I understand that the profits per partner at Davis Polk were in the range of $3 million or more per partner in the relevant time period, putting them well above the top 1 percent of earners. Indeed, as other courts have recognized, having a specific number as a reference point, whether or not reasonable or intentional, can have a dangerous "anchoring effect" on a person's judgment, including that of the jury. See, e.g., *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) ("[I]t is well established that an initial numerical reference, whether or not it is reasonable, can have an 'anchoring' effect on a person's subsequent judgments."); see also *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) ("When people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to 'anchor'

their subsequent judgments... to the initial number given.").

For better or for worse - but substantially for worse for the defendants in this case - there is a substantial likelihood that the sheer wealth of the defendants will lead to an improper verdict here for a couple of reasons: Their wealth is so substantial that jurors may find for plaintiff simply because they believe that a plaintiff's verdict will be functionally costless to them, and/or that the case provides them an opportunity to "soak the rich." Plaintiff's argument that defendants' financials are relevant to "defendants' conscious disregard of Plaintiff's rights" and their credibility, among other factors, only showcases this further. Plaintiff seemingly suggests that defendants' wealth make them less likely to respect individual rights or be credible, which is neither supported nor an appropriate inference to draw for the jury.

I would be happy to talk about other ways that plaintiff can make his underlying point - he might ask for example whether they are well compensated, or whether the firm is successful. He can make that underlying point without using the specific dollar figures during his case in chief.

Accordingly, the Court grants defendants' ninth motion *in limine* and related request to bifurcate the proceeding, so that the jury will determine the appropriate amount of punitive damages if it first determines that defendants are liable and

punitive damages are warranted.

IV. Plaintiff's Performance Reviews As Business Records. Turning now to the business records issue, I have reviewed the parties' submissions on this, including defendants' October 9, November 29, and December 18 letters and plaintiff's October 11 and December 1 letters. Dkt. Nos. 345, 346, 360, 362, 368. I have also heard oral argument from the parties.

The primary issue here is whether plaintiff's performance reviews are admissible hearsay under the "business records" exception. At the December 11, 2023 pretrial conference, I previewed that plaintiff's performance reviews fit under the hearsay exception of Federal Rule of Evidence 803(6) as business records, assuming that defendants would supplement or amend their prior Rule 902(11) certification, which they now have done. Dkt. No. 368-1 ("Amended Certification").

"The Court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." Fed. R. Evid. 104.

Hearsay evidence is generally not admissible at trial. *Id.* 802. Hearsay is a statement that is offered for the truth of the matter asserted in the statement and is not made by the declarant while testifying at trial. *Id.* 801(c). One of many

exceptions to this "hearsay rule" is what is called the "business records" exception. Under this exception, a "record of an act, event, condition, opinion, or diagnosis" is admissible hearsay if it satisfies a series of conditions described in Rule 803(6).

The Second Circuit has made clear that "Rule 803(6) favors the admission of evidence rather than its exclusion if it has any probative value at all." *United States v. Kaiser*, 609 F.3d 556, 574 (2d Cir. 2010). The parties do not appear to dispute that the performance reviews at issue fit under the description of, "a record of an act, event, condition, opinion, or diagnosis." Indeed, I have previously found, also in an employment case, that the plaintiff's performance review was admissible as a business record. *Ramsaran v. Booz & Co. (N.A.) Inc.*, 2015 WL 5008744, at *8 (S.D.N.Y. August 24, 2015) ("Courts have accepted personnel files and employee review documents as business records under Rule 803(6).").

I will now briefly address each of the Rule 803(6) elements. Based on the parties' submissions to the Court, including the amended certification, I find that the Rule 803(6) elements are met as to all but one of plaintiff's performance reviews.

A. Timeliness. The first prong imposes a "timeliness" requirement, which reflects the assumption that "any trustworthy habit of making regular business records will

ordinarily involve the making of the record contemporaneously." *United States v. Strother,* 49 F.3d 869, 876 (2d Cir. 1995) (emphasis added) (quoting *Seattle-First Nat'l Bank v. Randall*, 532 F.2d 1291, 1296 (9th Cir. 1976)).

In *Abascal v. Fleckenstein,* the Second Circuit found that the district court had committed reversible error in admitting a third-party report generated on the conditions of a prison as a "business record," where the underlying fact-finding work was conducted six months prior to the report. 820 F.3d 561, 565 (2d Cir. 2016). In so holding, the Second Circuit found that the report did not satisfy the elements of Rule 803(6), including the timeliness requirement, because a "six-month delay is too long a time to be considered a contemporaneous recording." *Id.*

Through the amended certification, defendants submit that the performance reviews at issue were "prepared at or near the time of the work performed that is the subject of the reviews." Amended certification Paragraph 6. Plaintiff argues that, nonetheless, certain of the performance reviews were not timely recorded.

In my view, plaintiff's timeliness concerns encapsulate two separate issues. First, there is the issue of summary reports, reflecting a summary of plaintiff's in-person feedback meeting, that may have been created months after the feedback meeting.

Second, there are performance reviews that summarize and evaluate events, such as plaintiff's work on specific assignments, that occurred months before the performance review.

As for the first issue, it appears that there is at least one summary review, DTX163, that raises serious timeliness concerns. According to the parties' pleadings, Mr. Cardwell's December 20, 2016, feedback meeting appears to have only been memorialized on March 28, 2017, more than three months later. See Dkt. No. 200 404 ("Third Amended Complaint" or "TAC"); Dkt. No. 209 Paragraph 404 ("Answer to TAC"). For context, March 28 was also less than 3 weeks after Mr. Cardwell's meeting with Mr. Reid, where they discussed Mr. Cardwell's low staffing, and the day before Mr. Cardwell's follow-up meeting with Mr. Reid and joined by Mr. Kreynin, who I believe was then the Managing Partner of Davis Polk. See Dkt. No. 305 at 24-25.

It is hard to say that a three-month delay in memorializing a meeting is contemporaneous. Indeed, in an unpublished opinion, the Second Circuit has indicated that two or three months is still untimely. See *Grant v. Lockett*, 2021 WL 5816245, at *2 (2d Cir. December 8, 2021) (finding error in admitting a third-party annual report that in part reported on the incident in question, where there was a two-month delay in providing an internal report of the incident within the

third-party entity).

At the December 11 hearing, defendants argued that a two to three-month delay is still timely in the context of an annual review schedule, and that any concerns are mitigated by the availability of the authors as witnesses at trial. But this does not address the concerns I have explained here. The fact that the feedback review meetings occur annually does not explain why the summary of the meeting was not drafted until 3 months after, and the opportunity to cross-examine the author does not address the failure of the author at the time of creating the record to do so on a contemporaneous basis. Accordingly, I conclude that the March 28, 2017, summary report does not fit under the "business records" exemption, as it cannot be said that the summary report "was made at or near the time" of what was recorded.

The second category of timeliness concerns does not present as much of an issue, however. Absent a showing to the contrary, which plaintiff has not provided, the testimony or here the certification supporting the timeliness of the reports suffices to satisfy the foundational requirements under Rule 803(6).

I think I will leave it at that. So there is certification stating that these reviews satisfy the requirements and unlike the other document with a substantial gap, I don't have a reason to discredit the certification.

Accordingly, the Court finds that Plaintiff's performance reviews are not inadmissible under this element of Rule 803(6), except that the March 28, 2017 summary review is inadmissible.

3. Kept in the Course of a Regularly Conducted Activity of a Business.

Defendants represent that "it is the regular practice of the Professional Development Department and Davis Polk to make [performance reviews] by requesting that Davis Polk employees or partners complete performance reviews of associates who worked on the same matters as the reviewing attorneys." Amended Certification Paragraph 7.

Plaintiff does not dispute that Davis Polk generated and kept performance reviews in the course of a regularly conducted activity of its business. And, as noted, this and other courts have admitted performance reviews as business records, which necessarily includes a finding that they were kept in the course of a regularly conducted activity of a business. See, e.g., *Zamora v. Open Door Family Medical Center, Inc.*, 2018 WL 4684131, at *1 n.2 (S.D.N.Y. 2018) (finding performance appraisals admissible under business records exemption based on deposition of the defendant's director of human resources). It is immaterial that the performance reviews were not automatically generated or not all associates received mid-year reviews. "A business record need

not be mechanically generated to be part of a 'regular practice.'" *Kaiser*, 609 F.3d at 575.

Accordingly, the Court finds that Plaintiff's performance reviews are not inadmissible under this element of Rule 803(6).

B. Whether the record was a regular practice of that activity. Defendants represent that plaintiff's performance reviews specifically "were made and are kept by the professional development department at Davis Polk in the ordinary course of business as part of the filing system for the professional development department for performance reviews of Davis Polk associates." Amended Certification Paragraph 7. Plaintiff does not dispute this. To the extent that plaintiff argues that his reviews were fabricated or false in any way, that goes to concerns of trustworthiness and the weight of the evidence, which I will address shortly.

Accordingly, the Court finds that plaintiff's performance reviews are not inadmissible under this element of Rule 803(6).

C. Conditions shown by witness testimony or by rule 902 certification. Defendants have submitted an amended declaration and certification by Lindsay H. Tomenson, the chief professional development officer of Davis Polk, or what I am calling the amended certification. Dkt. No. 368-1.

The amended certification is sufficient to meet the

requirements of Rule 803(6)(D) and to show that the requirements of Rule 803(6)(A) through (C) are generally met.

Rule 902(11) provides that the following evidence is self-authenticating and requires that no extrinsic evidence of authenticity to be admitted:

"The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record - and must make the record and certification available for inspection - so that the party has a fair opportunity to challenge them." *Id.* 902(11).

The Court finds that defendants have satisfied the notice requirement of this rule. Defendants have shared the underlying performance reviews with plaintiff in the course of discovery, which plaintiff does not dispute. See Dkt. No. 360 at 2 n.1.

Defendants also have provided the amended certification to plaintiff well before trial by filing it on the docket, which constitutes "reasonable written notice of the intent to offer the record" and "a fair opportunity to challenge." Fed. R. Evid. 902(11); see also *United States v. Komasa*, 767 F.3d 151, 155 (2d Cir. 2014) (finding adequate

notice even where written notice was not provided but the party had actual knowledge of the other party's intent to proffer self-authenticating documents before trial began).

Plaintiff has taken full advantage of the opportunity to challenge the certification, at least as originally filed, in two separate letters and oral argument.

The Court also finds that Ms. Tomenson is properly a "custodian or another qualified person" who can authenticate the performance reviews. Ms. Tomenson is the Chief Professional Development Officer at Davis Polk and has worked in the Professional Development Department since July 2018. Amended Certification 1. Ms. Tomenson is "knowledgeable about the matters set forth herein and about the relevant record-keeping practices of Davis Polk in my capacity as Chief Professional Development Officer." Id. 3. In particular, she is "personally familiar with Davis Polk's practice of collecting and maintaining performance reviews of attorneys," which are regularly kept and maintained in the Professional Development Department, the Department she supervises and manages. *Id.* 3-4. This is sufficient to recognize that Ms. Tomenson is a "custodian or another qualified person" under Federal Rule of Civil Procedure 902(11). See, e.g., Biggs v. Midland Credit Management, Inc., 2018 WL 1225539, at *4 (E.D.N.Y. March 9, 2018) (finding individual was custodian or another qualified person to authenticate the records where he,

in his position, was responsible for maintaining and overseeing the specific types of records in question). Notably, the standard is fairly low, as the Second Circuit has even recognized that an automatically generated record can be a business record without an individual who serves the role of a custodian or other qualified witness. See *United States v. Komasa*, 767 F.3d 151, 156 (2d Cir. 2014) ("[A]s a practical matter, the fact that the documents were obtained by an automated process does not affect their admissibility in this case.").

Plaintiff argues that Ms. Tomenson, whose role as chief professional development officer began after Mr. Cardwell left Davis Polk, lacks sufficient first-hand knowledge of the underlying facts and records. But the weight of the authority on this issue is that "the custodian need not have personal knowledge of the actual creation of the document." *Phoenix Associates III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995); see also *Miss Jones LLC v. Stiles*, 2020 WL 4704886, at *2 (S.D.N.Y. Aug. 13, 2020) ("A person who testifies to the admissibility of business records need only show that he or she is familiar with the record-keeping system of the business in question and knows how the records were created." (cleaned up)). Ms. Tomenson does not need to demonstrate personal familiarity with plaintiff's performance reviews or their creation and maintenance to authenticate them under Rule 902(11).

Finally, the Amended Certification is sufficient to lay a foundation for the performance reviews under Rule 803(6)(A) through (C), the elements discussed so far. The Amended Certification represents that all the elements of Rule 803(6)(A) through (C) are met, and courts have not required anything more. See, e.g., *Miss Jones LLC*, 2020 WL 4704886, at *2 (quoting the relevant portions of the custodian certification and finding the "perfunctory" requirement of the business records exception was met).

Accordingly, the Court finds that the amended certification is sufficient to permit defendants to self-authenticate plaintiff's performance reviews under Rule 902(11) and that, through the certification, defendants have demonstrated that the performance reviews are admissible as business records, with the exception of the March 2017 summary review and provided that plaintiff has not shown a sufficient lack of trustworthiness in the records. I proceed to that analysis now.

D. Trustworthiness. Plaintiff bears the burden of showing that the performance reviews are not sufficiently trustworthy, as Rule 803(6) requires that "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Plaintiff has failed to show a "lack of trustworthiness" behind his performance reviews to justify

inadmissibility under this hearsay exception.

"The principal precondition to admission of documents as business records... is that the records have sufficient indicia of trustworthiness to be considered reliable." *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994).

Plaintiff fails to show that his performance reviews were so contrived or biased that they are, on balance, sufficient to be inadmissible as business records. Plaintiff does not contest that the purported performance reviews are, in fact, performance reviews created and maintained as part of Davis Polk's regular records. Plaintiff takes issue with the accuracy of the contents of his performance reviews, and not that the performance reviews actually existed or that the exhibits in question were altered from the performance reviews as they were originally drafted. In *Potamkin Cadillac Corp.*, which Plaintiff cites, the Second Circuit affirmed a finding of untrustworthiness where an alleged compilation of computer data showed differences from the underlying data, indicating that the "compilation" was more than just a rote processing of the data. 38 F.3d at 633; see also *United States v. Reyes*, 157 F.3d 949, 953 (2d Cir. 1998) (affirming admission of prison visitation logbook despite irregularities such as missing names or different names written in the same handwriting or an alleged incentive by visitors to log incorrect information).

Plaintiff does not point to any such errors.

The Court recognizes that it is possible that performance reviews or other records might be "ginned up" to manufacture a record that supports a certain narrative, as plaintiff alleges defendants have done. Plaintiff raises questions about the trustworthiness of defendants' narrative about his work performance, including whether his performance reviews might have been influenced by some motivation to justify his eventual termination. But plaintiff does not raise enough concerns to render the performance reviews inadmissible as untrustworthy. Instead, the arguments and evidence he points to go toward the weight of the evidence. *Kaiser*, 609 F.3d at 576 ("*Kaiser* has succeeded in raising questions about the trustworthiness of the [records], but... [not] that the district court abused its discretion in finding that the they were sufficiently trustworthy under Rule 803(6).. Residual doubts on the question... Would go to the weight of the evidence, not its admissibility.").

To the extent that the authors of some of the performance reviews will testify on the stand, this further weighs in favor of admissibility under this prong of Rule 803(6), as the "degree of reliability necessary for admission is greatly reduced where... the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule." *Kaiser*, 609 F.3d at 576.

At the December 11 conference, Plaintiff specifically objected to DTX271, a four-page document among the performance reviews listed in the amended certification. The first page is titled "Lawyer Reviews - Summary Reviews" and appears to be an annual review summary delivered by Oliver H. Smith on January 12, 2018 to Mr. Cardwell. On the first page, under the two sections titled, "Substance of evaluation" and "Comments from the reviewee regarding his or her evaluation of his or her performance," it says: "click here and for follow-up discussion click here." "Click here" is underlined in each instance. The second page of DTX271 is identical to plaintiff's exhibit PTX505 and appears to reflect an email from Oliver Smith summarizing an undated review meeting with Mr. Cardwell. The third and fourth pages of DTX271 is identical to plaintiff's exhibit PTX512 and appears to be a third document containing a summary of Louis Goldberg and Oliver Smith's February 8, 2018, meeting with Mr. Cardwell at which Mr. Cardwell was given the "time to go" message.

Plaintiff objects to DTX271 -- notwithstanding by the way that it's his exhibit PTX512 -- and argues that it is not a business record because it lacks the usual indicia of it being a performance review, particularly given the lack of identifying markers on pages 2 to 4 of the document. Plaintiff also argues that these documents were created in anticipation of litigation and therefore are not business records. At the

December 11 conference as well as in the Amended Certification, Defendants explain that the two documents appearing at pages 2 to 4 in DTX271 are part of the review summary on page 1, as they correspond to the hyperlinks on page 1. Amended Certification 9. In short, all four pages of DTX271 are part of one complete document, which is a business record of Davis Polk's summary of the annual feedback to Mr. Cardwell.

Plaintiff has raised some questions about the trustworthiness of DTX271. For example, pages 2 to 4 of DTX271 do not resemble the other summary reviews in the record. See, e.g., DTX116. Defendants also do not explain why the review summary on page 1 is dated January 12, 2018, but the feedback meeting appears to have occurred afterwards, on February 8, 2018. Given that Plaintiff filed his EEOC complaint in August 2017, it is also possible that a potential litigation was on the horizon for defendants at the time DTX271 was created.

However, these concerns over the trustworthiness of DTX271 are not sufficient to disqualify DTX271 as a business record. Plaintiff does not proffer any anticipated testimony that DTX271 was created for litigation or that defendants are incorrect about pages 2 to 4 reflecting documents hyperlinked on page 1. Oliver Smith and Louis Goldberg, the purported author of the review summary and the participants in the February 8, 2018, meeting, are both expected to testify at trial, which further mitigates much of the concerns over the

record. The questions that plaintiff raises as to the trustworthiness of the document are issues regarding the weight of the evidence and are better addressed through cross-examination of the witnesses.

So I think I'll leave it at that. There is a little bit to be said on whether or not these documents are non-hearsay. I largely think that they are with some exceptions, and I think I'll wait to talk to you about that in January.

I want to just take a couple of brief minutes before we end, counsel, to talk about two things. One, I received your comments on the *voir dire* questions and summary of the law. As a general matter, I'm happy to make those changes. I do want to ask for the view of the defendants regarding plaintiff's proposed change to the description of law.

Counsel, I'm sorry to change gears so quickly, but do you have any concerns about that proposed modification that changes the clause "motivated, in part, by retaliation" to "motivated in part by his or her protected activity"? I should say, in my prior opinions, for example in the summary judgment opinion, I've used the phrase "motivated by retaliatory animus," which is another phrase that I've used.

But let me hear from you, counsel for defendants, if we can pivot after this brief filibuster to that topic. What do you think about the plaintiff's proposed change to the

summary of the law?

MR. BIRENBOIM: Your Honor, we don't agree with the proposal. I will admit that I don't have it in front of me, and I wasn't prepared to address it.

THE COURT: That's fine. So please write me.

This dovetails into a separate question that I wanted to ask of the parties. The parties submitted your feedback on the *voir dire* questions and the summary of the law by email. I appreciate that may have been the response to the fact that I've circulated the things to you by email. The fact that I circulated the *voir dire* questions to you by email though was not an invitation to you to communicate with me by email. I prefer that you not, my rules ask that you not. So what I would ask is that the parties submit to me a joint letter relatively promptly with all of your proposed modifications including those previously presented to the Court in email and each of your respective views regarding them. That way, the world will see what changes you've proposed, and also I'll be able to get your response, counsel for defendants, to plaintiff's proposed modification to the statement of the law.

Counsel for plaintiff, do you have any concerns about the request to modify the jury *voir dire* questions? They had three that were relatively modest. Do those look OK to you?

MR. JEFFRIES: From what I recall, your Honor, we were fine with those. Thank you.

THE COURT: So what I'm going to do is I'm going to send you all a version of the questionnaire that will incorporate those changes from the defendants and will otherwise be formatted to look like a questionnaire. I will get that to you maybe not today, maybe either later today or tomorrow. I ask that you let me know by letter -- and I apologize because I understand that many people will be away, but I ask that you let me know by letter no later than next Tuesday, if that questionnaire is OK. The substance of it is what you've seen before. So substantively I'm hoping that it won't take much time for to you review it, although I welcome more eyes on it. But largely I'll be looking for any concerns about the formatting of the document that I'll be sending to you. I'm asking for you to get that to me during the course of next week so that my staff and I can print out enough copies of the questionnaire so we can hand it to the jury department before the following weekend so that they have them in hand for the process on the 2nd. In order for us to be in that position we need to make sure you the parties don't have any problems with the documents before we begin the copying process.

So please, look at what we'll send you and give us any comments by next Tuesday. Please send us promptly a summary of your comments on those documents which include your prior comments and your responses, counsel for defendant, to plaintiff's proposed modification. Again, I point the parties

to the language that I used in the summary judgment decision as a possible alternative should the parties disagree about this proposal.

Very good. Thank you for your patience.

Anything else, first counsel for plaintiff.

MR. JEFFRIES: Not at this time, your Honor.

I do respectfully ask that the Court note our objections.

THE COURT: I'm sorry?

MR. JEFFRIES: Note our objections.

THE COURT: To what, everything that goes against you?

MR. JEFFRIES: Specifically with respect to Sophia Hudson's reviews, your Honor, and the timeliness aspect.

THE COURT: Thank you very much, noted.

And on that, again, I said it during my comments, the Court makes these decisions under Rule 104 based on the information presented. The certification says the magic words, as to the information included in those reviews. In the one instance where I had an admission, that the delay was substantial, I have not found that the documents could be admitted as a business record, but as for the other things, the certification checks the box, for one of four purposes regarding compliance with 803(6), and argument alone does not uncheck the box.

Anything else counsel for defendants?

MR. BIRENBOIM: No, your Honor. Thank you.

THE COURT: Very good. Thanks a lot.

(Adjourned)